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No. 88-519

In the Supreme Court of the United States

OCTOBER TERM, 1988

HO FAT SETO DBA HO FAT OF CALIFORNIA, PETITIONER

v.

ANN MCLAUGHLIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly awarded back wages under the Fair Labor Standards Act, 29 U.S.C. (& Supp. IV) 201 *et seq.*, to nontestifying employees based on the representative testimony of other employees concerning hours worked.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Beliz v. *McLeod & Sons Packing Co.*, 765 F.2d 1317 (5th Cir. 1985) 9

Brennan v. *General Motors Acceptance Corp.*, 482 F.2d 825 (5th Cir. 1973) 6, 7

Brock v. *Norman's Country Market, Inc.*, 835 F.2d 823 (11th Cir. 1988), cert. denied, No. 87-1593 (June 20, 1988) 7

Brennan v. *Parnham*, 366 F. Supp. 1014 (W.D. Pa. 1973) 8

Brock v. *Seto*, 790 F.2d 1446 (9th Cir. 1986) 10

Brock v. *Tony & Susan Alamo Foundation*, 842 F.2d 1018 (8th Cir. 1988) 8

Castillo v. *Givens*, 704 F.2d 181 (5th Cir.), cert. denied, 464 U.S. 850 (1983) 7

Citicorp Industrial Credit, Inc. v. *Brock*, No. 86-88 (June 22, 1987) 10

Donovan v. *Bel-Loc Diner, Inc.*, 780 F.2d 1113 (4th Cir. 1985) 6, 7

Donovan v. *Burger King Corp.*, 672 F.2d 221 (1st Cir. 1982) 8

Donovan v. *New Floridian Hotel, Inc.*, 676 F.2d 468 (115h Cir. 1982) 6, 7

Donovan v. *Simmons Petroleum Corp.*, 725 F.2d 83 (10th Cir. 1983) 6

Donovan v. *Williams Oil Co.*, 717 F.2d 503 (10th Cir. 1983) 7

Gilbert v. *Old Ben Coal Co.*, 407 N.E.2d 170 (Ill. App. 1980) 8

Cases—Continued: Page

Marshall v. *Brunner*, 500 F. Supp. 116 (W.D. Pa. 1980), aff'd, 668 F.2d 748 (3d Cir. 1982) 7
Marshall v. *R & M Erectors*, 429 F. Supp. 771 (D. Del. 1977) 8
Mt. Clemens Pottery Co. v. *Anderson*, 149 F.2d 461 (6th Cir. 1945), rev'd, 328 U.S. 680 (1946) 4, 5, 6, 10

Statute and rule:

Fair Labor Standards Act, 29 U.S.C. (& Supp. IV) 201 *et seq.* 2
29 U.S.C. 202(a) 10
29 U.S.C. 216(c) 10
Fed. R. Evid.:
Rule 403 8
Rule 801(c) 9

Miscellaneous:

E. Cleary, *McCormick on Evidence* (3d ed. 1984) 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 850 F.2d 586. The findings of fact and conclusions of law of the district court (Pet. App. D1-D14) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1988. The petition for a writ of certiorari was filed on September 26, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Ho Fat Seto owns and operates a garment factory in Los Angeles, paying piece-rate wages to all

nonmanagerial employees (Pet. App. A2, D3, D4). Respondent Secretary of Labor brought this action under the Fair Labor Standards Act (FLSA or Act), 29 U.S.C. (& Supp. IV) 201 *et seq.*, alleging, among other things, that petitioner had failed to keep required records and to pay his employees minimum wage and overtime for all hours worked (Pet. App. B1-B6). The Secretary sought to enjoin petitioner from future FLSA violations and to obtain back wages and an equal amount of liquidated damages for 28 named employees (*id.* at A2, B1-B6).

At trial, the five employee witnesses presented by the Secretary all testified that they began work about 7 a.m. on weekdays but were not permitted to punch the factory time clock until the starting bell rang at 7:30 a.m. (Pet. App. A2, D5). Three of the employees testified that they also worked after punching out when the quitting bell rang at 4:30 p.m. (*id.* at A2-A3, A5, D5). Employees received a half-hour lunch break and two 15-minute rest breaks each weekday (*id.* at D5). The Secretary's witnesses consistently testified that they worked nearly every Saturday from 7:30 a.m. to 2:15 p.m., but were not allowed to record their Saturday hours (*id.* at A2, D4). They further stated that the hours reflected on their pay stubs always underrepresented the hours they worked, and that they were not paid for hours they worked in excess of 40 hours per week (*id.* at A3). The Secretary had available many more employee witnesses who would have given substantially the same testimony, but the district court permitted only five to testify on the ground that further testimony would have been cumulative (*id.* at D3). In addition to the employee witnesses, the Secretary's compliance officer testified that she had calculated wages due after interviewing 16 employees and reviewing petitioner's payroll records, and adjusting for business fluctuations (*id.* at A3, D11-D14).

Petitioner's payroll records, with one minor exception, indicated that no employee ever worked on Saturday, worked more than 40 hours a week, or received any overtime compensation during the period covered by the complaint (Pet. App. D4). Petitioner presented four rebuttal witnesses who testified that they never worked before the starting bell, after the quitting bell, or on Saturdays (*id.* at A3, D3).

2. The district court credited the testimony of the Secretary's witnesses, finding that it was "generally consistent and established a pattern of employment conditions applicable to all employees" of petitioner (Pet. App. D2, D3). The court specifically found that the five testifying employees were "representative of all employees employed by [petitioner] during the relevant period" and that "further testimony would have been cumulative because it was clear all employees generally worked the same hours and were paid strictly on a piece-rate basis" (*ibid.*). In addition, the court rejected the testimony of petitioner's witnesses as "not credible," and found that petitioner's payroll records were "false and inaccurate" (*id.* at D3, D4).

Based on those credibility determinations, the district court found that all of petitioner's employees "regularly worked over 40 hours per week," including more than eight hours Monday through Friday and four to six hours on Saturdays (Pet. App. D5). Thus, petitioner failed to pay all 28 named employees for overtime at not less than one and one-half times their regular rate of pay, and failed to pay some employees the minimum wage of $3.35 per hour for all hours worked (*ibid.*). The court also adopted as "reasonable and correct" the back wage computations made for all 28 employees by the compliance officer,

which took into account the employer's regular pattern of business fluctuations (*id.* at D6).[1]

The district court thus concluded that petitioner violated the FLSA by falsifying payroll records and by failing to pay minimum wage and overtime compensation (Pet. App. D7). The court held that the Secretary had met her burden of showing, in the absence of accurate employer payroll records, that the "employees performed work for which they were not paid the compensation required under the Act and the extent of such work 'as a matter of just and reasonable inference' " (*ibid.*, quoting *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)). The court noted that, once testimony of representative employees establishes prima facie proof of a pattern or practice of FLSA violations, the burden shifts to the employer to rebut the existence of the violations or to prove that individual employees are excepted from the pattern or practice (Pet. App. D8). Here the court concluded that "[r]epresentative employee testimony established a pattern of violations" and that petitioner presented "no credible evidence to the contrary" (*ibid.*). Accordingly, the court enjoined petitioner from further violations of the Act and awarded back wages plus an equal amount of liquidated damages to all 28 named employees (*id.* at D9-D11).

3. The court of appeals affirmed. It held (Pet. App. A4-A5) that "the *Mt. Clemens Pottery* standard allows district courts to award back wages under the FLSA to non-testifying employees." Applying the burdens of proof set out in *Mt. Clemens Pottery*, 328 U.S. at 687, the court of appeals agreed with the district court that the testimony of the Secretary's five employee witnesses "established 'as

[1] Specifically, the district court found that the employees generally worked 40 hours per week for three months; 42½ hours per week for three months; 46 hours per week for three months; and 50 hours per week for three months (Pet. App. D6).

a matter of just and reasonable inference,' *id.*, that all of the employees regularly worked over eight hours on weekdays and over six hours on many Saturdays" (Pet. App. A5). Because that testimony "directly supports" the district court's finding that "all" petitioner's employees regularly worked more than 40 hours per week, the court of appeals held that the 23 nontestifying employees had also established a prima facie case that they had worked unreported hours (*ibid.*).

Next, the court of appeals held that petitioner had failed to meet its burden under *Mt. Clemens Pottery* to negate the reasonable inference from the testimony that all of petitioner's employees were similarly situated (Pet. App. A5). The court afforded "great deference" to the trial court's determination that petitioner's witnesses were not credible, and found that credibility determination "not clearly erroneous" (*id.* at A5-A6). As petitioner did not contest the district court's finding that its payroll records were false and inaccurate, there was no credible evidence to negate the "reasonable inferences" drawn from the Secretary's case (*id.* at A4, A6).

Finally, the court of appeals affirmed the district court's damages award, applying the *Mt. Clemens Pottery* standard that, if an employer fails to carry its burden of establishing the precise amount of work performed, damages are to be awarded "even though the result may be only approximate" (Pet. App. A6 (quoting *Mt. Clemens Pottery*, 328 U.S. at 688)). Noting that the district court had "considered the inconsistencies in the testimony of the Secretary's witnesses when it formulated the awards," the court concluded that the damages awarded were "properly based upon reasonable inferences from the employees' testimony" (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, no further review is warranted.

1. In *Mt. Clemens Pottery,* this Court held that, if an employer has failed to keep proper records of wages and hours as required by law, an employee seeking to prove a violation of the FLSA need only "prove[ ] that he has in fact performed work for which he was improperly compensated" and "produce[ ] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference" (328 U.S. at 687). Thereafter, the burden shifts to the employer "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence" (*id.* at 687-688). If the employer fails to meet that burden, damages may be awarded "even though the result be only approximate" (*id.* at 688). That allocation of the burden of proof "proper[ly] and fair[ly]" avoids penalizing employees by "plac[ing] a premium on an employer's failure to keep proper records in conformity with his statutory duty" (*id.* at 687).[2]

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[2] Petitioner's contention that each employee must testify in order to establish the "fact of overtime work" (Pet. 9 (emphasis omitted)) is simply wrong. See, *e.g., Donovan* v. *Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985); *Donovan* v. *Simmons Petroleum Corp.*, 725 F.2d 83, 86 (10th Cir. 1983); *Donovan* v. *New Floridian Hotel, Inc.*, 676 F.2d 468, 472 (11th Cir. 1982); *Brennan* v. *General Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973). Indeed, *Mt. Clemens* itself was a suit by a local union and seven of its members on behalf of some 300 similarly situated employees, only eight of whom testified at trial. See *Mt. Clemens Pottery Co.* v. *Anderson*, 149 F.2d 461, 462 (6th Cir. 1945), rev'd, 328 U.S. 680 (1946).

The award of back wages to 23 nontestifying employees in this case is fully consistent with the uniform application of *Mt. Clemens Pottery* to permit recovery of back wages on behalf of nontestifying employees, based on the representative testimony of other similarly situated employees.[3] As the Eleventh Circuit recently explained, "[t]he fact that several employees do not testify does not penalize their claim; it is clear that each employee need not testify in order to make out a prima facie case of the number of hours worked as a matter of just and reasonable inference." *Brock* v. *Norman's Country Market, Inc.*, 835 F.2d 823, 828 (1988) (internal quotation marks and citations omitted), cert. denied, No. 87-1593 (June 20, 1988). Instead, "[c]ourts have frequently granted back wages under the FLSA to non-testifying employees based upon the representative testimony of a small percentage of the employees," as long as that testimony is "fairly representational" of the larger group (*Donovan* v. *Bel-Loc Diner, Inc.*, 780 F.2d at 1116). "The Secretary is not required to present each employee as a witness"; and it is "inadequate" to compensate only employees who "chose or were chosen to testify" if other employees were also im-

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[3] *Donovan* v. *Bel-Loc Diner, Inc., supra* (testimony of 22 employees supports award to 98 employees); *Donovan* v. *Williams Oil Co.*, 717 F.2d 503 (10th Cir. 1983) (testimony of 19 employees supports award to 34 employees at nine separate service stations); *Castillo* v. *Givens*, 704 F.2d 181 (5th Cir.) (testimony of 13 employees supports award to 39), cert. denied, 464 U.S. 850 (1983); *Donovan* v. *New Floridian Hotel, Inc., supra* (testimony of 23 employees supports award to 207); *Brennan* v. *General Motors Acceptance Corp.*, 482 F.2d 825 (5th Cir. 1973) (testimony of 16 employees supports award to 27); *Marshall* v. *Brunner*, 500 F. Supp. 116 (W.D. Pa. 1980) (testimony of 48 employees supports award to 93), aff'd, 668 F.2d 748 (3d Cir. 1982).

properly paid. *Brock* v. *Tony & Susan Alamo Foundation*, 842 F.2d 1018, 1019-1020 (8th Cir. 1988).[4]

The obvious pragmatic basis for permitting reliance on such representative testimony is to avoid burdening the trial courts with unending parades of cumulative witnesses. See, *e.g.*, *Donovan* v. *Burger King Corp.*, 672 F.2d 221, 225 (1st Cir. 1982) (approving a significant limitation on the number of witnesses in an FLSA case as within the trial court's broad discretion under Fed. R. Evid. 403 to prevent the "needless presentation of cumulative evidence"). In this case, as in *Burger King*, the district court itself decided to hear only five employee witnesses called by the Secretary because further testimony would have been cumulative (Pet. App. D2-D3). The court of appeals, after reviewing the record, concluded that the testimony of these five employees "directly supports the district court's findings that all [petitioner's] employees regularly worked over forty hours per week" and established a prima facie case on behalf of the 23 nontestifying employees (Pet. App. A5). Since that prima facie case was not rebutted, all 28 named employees were awarded back wages.

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[4] None of the cases on which petitioner relies (Pet. 11) in any way undermines the general validity of representative testimony in FLSA cases. *Gilbert* v. *Old Ben Coal Co.*, 407 N.E.2d 170 (Ill. App. 1980), was not a pattern and practice case at all, but merely an unpersuasive claim by two individual plaintiffs. In *Marshall* v. *R & M Erectors*, 429 F. Supp. 771 (D. Del. 1977), the court actually awarded benefits to 12 identified, nontestifying employees based on testimony by 11 other employees, denying relief only to 11 unidentified employees as to whom there was virtually no record evidence. In *Brennan* v. *Parnham*, 366 F. Supp. 1014 (W.D. Pa. 1973), the court also awarded back wages to unidentified employees. Here, of course, the Secretary sought relief only for 28 employees specifically named in her complaint, whose periods of employment and wages were reflected on petitioner's payroll records (Pet. App. B6, D11).

Petitioner also complains that in this case there was "no reliable, admissible evidence of the *fact of damage*" to the 23 nontestifying employees, contending that the claim on their behalf was supported only by "insubstantial, bald hearsay" (Pet. 10). That argument is plainly wrong. The Secretary's five witnesses testified concerning the hours worked by themselves and their fellow workers based on personal knowledge and direct observation.[5] On appeal, petitioner did not challenge either the admissibility of that evidence or its reliability as to the hours worked by the testifying employees. Nor was that evidence "hearsay": the witnesses testified based on personal observation of their coworkers' presence in the garment factory, not by repeating their coworkers' out-of-court statements that they had worked overtime. See Fed. R. Evid. 801(c); E. Cleary, *McCormick on Evidence* § 246 (3d ed. 1984) (definitions of hearsay). The district court did not err by admitting and crediting the testimony of the Secretary's witnesses about their coworkers' hours.

2. Petitioner now asks this Court to "re-examine[ ]" *Mt. Clemens Pottery* by holding, contrary to the unanimous opinion of the courts of appeals, that it does not authorize recovery of back wages under the FLSA on behalf of nontestifying employees (Pet. 9). Instead, petitioner wants this Court to require, for the first time, that each employee on whose behalf an award of back wages is sought "testify briefly in open court," adding that "since the statute *directs* the Secretary to pay each employee his

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[5] The Secretary's witnesses not only testified as to their own hours of work, but also stated that their fellow employees worked the same hours that they did (Tr. 29, 78-79, 187, 366-367 (naming other employees who worked the same hours as testifying employees)). Cf. *Beliz* v. *McLeod & Sons Packing Co.*, 765 F.2d 1317, 1331 (5th Cir. 1985) (representative witnesses may testify based on personal knowledge of the work performed by their nontestifying coworkers).

share of the recovery, it seems ludicrous to allow any recovery for an employee whose whereabouts are unknown" (Pet. 14). *Mt. Clemens Pottery,* however, needs no reassessment; it has stood well the test of time and has been faithfully and sensibly applied by the lower courts. An employer who fails to keep accurate records as required by the FLSA " 'cannot be heard to complain' " if an award of damages lacks " 'precision of measurement.' " *Brock* v. *Seto,* 790 F.2d 1446, 1448 (9th Cir. 1986) (quoting *Mt. Clemens Pottery,* 328 U.S. at 688). An honest employer has nothing to fear from the rule that reasonable inferences about nontestifying workers' hours can be drawn from the testimony of other workers. Only because petitioner's records were "false and inaccurate" (Pet. App. D4) was it necessary to engage in any process of inference in order to reconstruct his employees' hours. Petitioner now seeks to benefit from the falsity and inaccuracy of his own records. As the *Mt. Clemens* Court held (328 U.S. at 687), no such benefit is due.[6]

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[6] Moreover, the FLSA expressly authorizes awards of back wages that are unclaimed by employees after three years to revert to the Treasury of the United States (29 U.S.C. 216(c)). That rule, and the full disgorgement ordered against petitioner in this case, serve not only to ensure that an employer will lack the incentive to underpay employees in the hope that they cannot be found later, but also to "eliminate the competitive advantage enjoyed by goods produced under substandard conditions." *Citicorp Industrial Credit, Inc.* v. *Brock,* No. 86-88 (June 22, 1987), slip op. 8; see 29 U.S.C. 202(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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